

STEPTOE & JOHNSON ^{LLP}

ATTORNEYS AT LAW

#E1-1296
RJ

David H. Coburn
202.429.8063
dcoburn@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

January 10, 2005

Received
1/10/05

VIA HAND DELIVERY

Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Rini Ghosh
STB Docket No. FD 34284

Re: Finance Docket No. 34284 -- Southwest Gulf Railroad Company -- Petition for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line In Medina County, Texas

Southwest Gulf Railroad Comments on Draft EIS

Dear Ms. Ghosh:

Petitioner Southwest Gulf Railroad ("SGR") hereby offers the following comments on the Draft EIS issued by the Board on November 5, 2004. SGR appreciates the hard work and careful study that SEA and its contractor have undertaken in preparing the thorough Draft EIS that has been issued. SGR also agrees with the DEIS's conclusions with respect to the environmental preference of a rail line versus a no-build alternative that would result in truck transport of aggregate from the quarry to a remote rail loading area. Further, SGR continues to believe, and the DEIS supports its view, that the environmental impacts of its proposed route are either minimal or can be mitigated so that they are not significant. In that regard, SGR stands ready to consult with SEA and other agencies to address any remaining concerns as the NEPA and Section 106 processes move forward.

SGR's comments will focus on the proposed mitigation measures. The comments are designed, in some cases, to clarify the terms of those measures and, in others, to propose modifications that SGR believes will improve the mitigation measures in a manner consistent with SGR's understanding of SEA's intentions and the public interest. SGR stands prepared to respond to any questions or concerns raised by these comments.

Voluntary Mitigation Measure No. 3 -- SGR has voluntarily agreed to use continuously welded rail for the line of rail that it proposes to construct between the quarry and the UP line. This will reduce noise levels from train operations between the quarry plant and the southern terminus of the SGR line. However, for sake of clarification, SGR notes that it may not use continuously welded rail for the loading loop or the straight track alternative at the plant site, and did not intend that its offer of using such rail for the line extend to the loading loop or alternate straight track. Based on its consultations with HDR Engineering, a rail engineering firm with which it has consulted on these matters, SGR understands that it likely will not be practical or economical to use welded rail for this track given the tight confines of any loading loop track and the number of switches that would be located on the loop or the straight track at the plant site. Further, to the extent that such rail is designed as a noise mitigation measure, its use on the grounds of the plant facility will not serve that purpose, particularly given that trains will be moving at a very slow speed (about 5 mph) at the plant site.

SGR notes in this regard that the DEIS concludes that rail line operations over the proposed route or Alternatives 2 or 3 will not exceed the STB's noise impact thresholds set forth at 49 CFR 1105.7(e)(6) (an increase in noise level of 3 dbA or more and resulting in a noise level of 65dbA or more). This is true at both receptors ML1 and ML2, which are the studied receptors closest to the quarry plant area. See DEIS at 4-80. Thus, SGR submits that there is no need to mitigate noise through the use of welded rail in the plant area since noise impacts there will be minimal.

Mitigation Measure No. 6 -- SGR suggests that this measure be modified to add the following language before the period: "consistent with recognized highway safety standards taking into account the level of highway traffic at the crossing." SGR recommends that this language be adopted in order to better define the term "appropriate" as used in the draft mitigation measure. In this regard, SGR recognizes that the nature of crossing protections deemed warranted will vary based on the level of highway traffic at issue. SGR will consult with responsible highway safety officials on these matters.

Mitigation Measure No. 18 -- SGR recommends that the last clause of this measure be modified as follows: "and shall remediate any soils contaminated by any diesel or gasoline release for which Southwest Gulf Railroad Company is responsible as soon as practicable." This revised language will clarify, we believe consistent with SEA's intent, that SGR is not responsible for remediating soils that are contaminated as a result of conduct unrelated to SGR's activities.

Mitigation Measure No. 24 -- This mitigation measure requires that SGR conduct a floodplain study and "obtain" a Medina County Floodplain "permit" for each floodplain crossing prior to initiating rail construction. The condition is apparently based on a conversation during the pre-DEIS consultation period between SEA's third party consultant and the Medina County Floodplain Administrator, which is described in a message set forth in Appendix C to the DEIS (at page C-39) and discussed at page 4-35 of the DEIS. SGR proposes that the condition be revised to require that SGR: (a) conduct a floodplain study for submission to the Medina County Floodplain Administrator and (b) consult with the Medina County Floodplain Administrator to ensure that SGR's construction plans will not cause more than a 12 inch rise in the current 100-year floodplain elevation, consistent with the Floodplain Administrator's permitting standards as set forth during the pre-DEIS consultation process. SGR intends to adhere to the

standards for floodplain crossing described in the communications with the Floodplain Administrator. Based on such adherence, SGR also believes that it will meet the standards for issuance of a permit by the Administrator. Nonetheless, in light of federal preemption of state and local rail permitting obligations that might stifle rail construction authorized by the STB, SGR does not believe that its ability to construct its rail line should be conditioned on whether the Medina County Floodplain Administrator chooses to issue a permit to SGR, or to do so in a timely manner. See discussion of exclusive federal jurisdiction at page 4-13 of the DEIS. Accordingly, SGR urges that language in this mitigation measure requiring that a permit be obtained prior to construction be eliminated, and that the alternative mitigation measures described above be adopted in its place.

Mitigation Measure No. 26 -- This measure would require that SGR minimize ground contact by "oil cleaning materials." SGR is not certain what is meant by the quoted term and thus requests that this measure be clarified, or eliminated, in the final EIS.

Mitigation Measure No. 30 -- SGR is concerned about the portion of this proposed measure that would require SGR to avoid placing fill material or structures in the ordinary high water mark of any creek channel that will be crossed. This absolute restriction could have an adverse impact on the final design of bridges, with no offsetting benefit. To the extent that a Corps permit may be needed to cross any creek channel, SGR would need to comply with the terms of any such permit prior to initiating construction, as the DEIS recognizes at pages 4-38 and 4-39. Also see proposed mitigation measure no. 25. Consistent with the terms of the DEIS, which recognize that Corps approval would be required with respect to any crossing subject to Corps jurisdiction under Section 404 of the Clean Water Act, SGR requests that this proposed measure be revised to require that SGR comply with any applicable Corps requirements in connection with the placement of fill material or structures in creeks during construction. Further, SGR intends to use best management practices in connection with the construction of the stream crossings and expects to minimize any placement of fill material and structures in the ordinary high water mark of any creek channel, consistent with its obligation to minimize impacts to wetlands as per the opening provisions of mitigation measure no. 30.

Mitigation Measure No. 32 -- Based on a May 28, 2003 letter from the Texas Parks and Wildlife Department, SEA has proposed that graded embankments not exceed a 4:1 slope. SGR respects the views of TPW, but believes that there may be situations where a 3:1 slope may be appropriate in terms of runoff impacts, while allowing the railroad's footprint to be smaller. SGR thus requests that it be allowed the flexibility to consult with TPW about any proposed embankments that would have a 3:1 slope and be permitted to use such embankments if TPW so consents.

Mitigation Measure No. 33 -- This proposed mitigation measure is very broadly written to require SGR to avoid disturbing any natural buffers contiguous to floodplains in order to prevent soil erosion and preserve wildlife cover, food sources and travel corridors. SGR will of course endeavor to avoid any such disturbance of natural buffers, but complete avoidance may not be feasible. Thus, SGR recommends that this measure be revised to require that SGR use best practices during construction to avoid or minimize disturbance to the relevant natural buffers.

Mitigation Measure No. 41 -- This mitigation measure could be read to require that SGR reroute or redesign its line following consultation to ensure well structure and pipeline integrity. SGR believes that the goals of this measure will generally be achievable with only minimal engineering changes. Thus, SGR requests that the condition be revised to eliminate the words "to the design of the rail line." Further, the comma between "well" and "structure" also should be eliminated.

Mitigation Measure No. 45 -- The Draft Programmatic Agreement (PA) set forth in the DEIS is substantively unchanged from that which SGR negotiated with the Texas Historic Commission several months ago. SGR stands ready to sign the agreement in its current form. SGR agrees with the DEIS that the PA offers sufficient mitigation for any impacts to cultural resources. In that regard, SGR notes that the PA contemplates that the issue of cultural landscape will be addressed by the study required to be conducted pursuant to the PA, Section III.B.2 and 3. Further, the PA also contemplates an assessment of potential future development in the project area that might be encouraged by the rail line. See PA, Section I.C. Thus, to the extent that SEA believes that further analysis of cultural landscape issues may be warranted (and this is raised as an issue at page 4-98 of the DEIS), the PA offers a means for undertaking that analysis and addressing the cultural landscape question.

SGR appreciates the opportunity to offer these comments and looks forward to the issuance of the Final EIS for its rail project.

Respectfully,

A handwritten signature in dark ink, appearing to read "David H. Coburn", with a long, sweeping horizontal stroke extending to the right.

David H. Coburn
Attorney for Southwest Gulf Railroad